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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE HAYES, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 665

JOE HAYES, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals is reported at 270 F. 2d 319.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1959. A petition for rehearing was denied on October 5, 1959. By order dated December 17, 1959, Mr. Justice Douglas extended to February 2, 1960, the time to file a petition for writ of certiorari. The petition was filed on January 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In probating the will of a deceased Indian allottee of restricted lands under § 2 of the Act of June 25, 1910 (25 U.S.C. 373), the Secretary of Interior determined that under the applicable law of Oregon the devisee under the will, who had disappeared 13 months before the death of the decedent and had not been heard from for over seven years, must be presumed to have survived the decedent and to have died only at the expiration of the seven years' absence. The question presented is whether that determination is subject to judicial review on a claim that the Secretary misinterpreted Oregon law.

STATUTES INVOLVED

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, provides in part as follows:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended, 25 U.S.C. 373, provides in part as follows:

> Any persons of the age of twenty-one years having any right, title, or interest in any allot-

ment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: * * *.

STATEMENT

This is an action to set aside orders of the Secretary of Interior directing distribution of the restricted estates of two Indians, John Thomas and his son, Joseph Thomas. The orders were entered under the authority of §§ 1 and 2 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 372, 373, § 1 authorizing the Secretary to determine the heirs of Indians dying intestate, and § 2 authorizing him to approve the wills of Indians dying testate.

John Thomas died on September 22, 1940, leaving a will devising all his property to his son, Joseph Thomas. Joseph Thomas had disappeared on August 3, 1939, some 13 months before the death of his father, and has not been heard from since. It is undisputed that the circumstances of the son's disappearance were such that he can properly be presumed to have been dead at least since August 3, 1946, seven years after his disappearance. The question ultimately in issue, and which controls the distribution of both

estates, is whether the son was alive or dead on the date of his father's death, September 22, 1940. If the son survived the father, he took the father's estate under the father's will, and both the father's estate and the son's separate estate passed, upon the son's later presumed death, to the son's next-of-kin, his half-brother, whose interest has since descended to the latter's widow, Emma Luton. If, on the other hand, the son is deemed to have died before the father, then the father inherited the son's estate, the father's devise to the son lapsed, and both estates pass to the father's next-of-kin, his first cousin, the petitioner here.

The hearings before the Examiner of Inheritance as to the two estates were consolidated, and on June 20, 1956, the Examiner entered orders awarding both estates to Emma Luton. In the order as to the son's estate, the Examiner held that there was no sufficient evidence to prove when the son died and that he must therefore be presumed to have lived throughout the first seven years of his absence and to have died on August 3, 1946, thus surviving his father and leaving as his sole heir-at-law his half-brother (R. 26A–28A). The order entered in the father's estate approved the father's will and incorporated by reference the finding in the son's estate that the son was presumed to have died on August 3, 1946, thus surviving the father and taking under the father's will (R. 9A–12A). The Examiner denied rehearing (R. 29A–33A).

On petitioner's appeal to the Secretary, the Solicitor of the Department, acting under a delegation

of authority from the Secretary, affirmed the Examiner's order. Noting that the Department adopted the law of the state of the decedent's domicile in resolving such issues (R. 17A), the Solicitor concluded that under the law of Oregon a person presumed dead from seven years' absence is presumed to have continued to live throughout the seven-year period and to have died on the last day of that period. Since there was no sufficient evidence to the contrary, it was held that the Examiner had properly presumed that the son was still alive on the date of his father's death (R. 13A–20A).[1]

Petitioner then brought this action in the United States District Court for the District of Columbia, purportedly under § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1009), to review and set aside the Secretary's decison and to enjoin distribution of the estates pursuant to that decision. The district court dismissed the action without opinion (R. 63A). The court of appeals affirmed, holding that the determination of the son's heirs was expressly made "final and conclusive" by § 1 of the 1910 Act; that the finding that the son survived the father was an essential part of that determination; and hence that that finding was final for all purposes, including the disposition of the father's estate under § 2 of the

[1] The basis for the decision is illuminated by the Solicitor's opinion letter denying petitioner's request for reconsideration. Since that opinion (Exhibit 4 to the Complaint) is not printed in the Joint Appendix, we have set it out in the Appendix, *infra*, pp. 12-21, for the Court's convenience.

Act. It further held that even if the finding were reviewable, it was not "arbitrary or unreasonable" and hence could not be set aside (Pet. 19–21).

Judge Burger dissented, contending that the non-reviewability of the order entered in the son's estate under § 1 could not affect the finality of the order entered in the father's estate under § 2 and that, since § 2, unlike § 1, did not make determinations thereunder "final and conclusive", that order was subject to review under the Administrative Procedure Act. On the merits, he concluded that the presumption applied by the Examiner that death occurred at the end of the seven years' absence was contrary to the law of Oregon as announced in *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, 372 (Pet. 21–30).[2]

ARGUMENT

While there is room for debate what the law of Oregon is on the issue involved here, it cannot be said that the Secretary's conclusion was arbitrary

[2] Judge Burger's opinion also dealt with alternative contentions made by the Government in the court of appeals that the Secretary was not bound to follow Oregon law and that the decision may have been based on an inference of fact from evidence rather than a legal presumption. Upon further examination of the record and discussions with representatives of the Interior Department, we are satisfied that the Secretary, whether required to do so or not, did intend to base his decision on Oregon law and on a legal presumption of a continuance of life throughout the seven-year period rather than upon an inference of fact. Hence there is now no disagreement on those questions and, since they were not reached by the majority of the court below, they afford no reason for the grant of certiorari.

or irrational,[3] and the only question is whether the decision is open to review by the courts for an alleged error in applying the Oregon law of presumptions. In our view it is clear that the order entered in the father's estate under § 2 of the 1910 Act would not be

[3] There is admittedly language in *Hefford* v. *Metropolitan Life Ins. Co.*, 173 Ore. 353, consisting primarily of the court's quotation of other authorities, suggesting a view of the presumptions contrary to the Secretary's decision. The precise issue in that case, however, was very different from that here. The question there was whether the plaintiff in an action on an insurance policy, having produced enough evidence from which the jury could infer that the insured died on the date of his disappearance, was entitled to have the jury instructed that the *fact* of death could be presumed from the insured's unexplained absence for seven years. All the court actually held was that the presumption of death was not irrelevant in an attempt to prove that death occurred at the date of disappearance—which it would not be even if the presumption, in the absence of any evidence, were that death occurred at the end of the period. Cf. *Peak* v. *United States*, 353 U.S. 43. The court's reliance, in support of that result, on broad statements of other authorities having implications going beyond the precise point does not necessarily mean that the Oregon court endorsed all of those implications or would feel bound to follow them should the issue be squarely presented. On the other hand, the issue in *Massachusetts Bonding & Ins. Co.* v. *Helman*, 62 F. 2d 902 (C.A. 9), relied on by the Secretary (*infra*, p. 20), was in all material respects identical to that here, and there the Ninth Circuit, applying Oregon law, held that in the absence of evidence a person presumed dead after seven years' absence must be presumed to have survived an ancestor dying during the seven-year period. Whether the precise holding of the Ninth Circuit, on the one hand, or the broad implications of quotations relied on by the Oregon Supreme Court in deciding a quite different question, on the other, more accurately reflects the law of Oregon on the issue may be mooted, but the Secretary's decision to follow the Ninth Circuit in the absence of more conclusive authority in the state courts can hardly be labelled unreasonable.

so reviewable even if it stood alone. Hence we need not rely upon the further ground adopted by the court of appeals that, even if the determination in the father's estate would otherwise be reviewable, it was not reviewable here because the same finding was an essential part of the determination of the son's heirs under § 1 and was there expressly made "final and conclusive."

1. No reason appears why Congress would have intended the same kind of finding to be subject to a different scope of review when made in an order probating a will under § 2 of the Act than when made in determining the heirs of an intestate under § 1. The omission from § 2 of the words "final and conclusive" found in § 1 seems to reflect only a lack of awareness that the disposal of the estate might turn on questions extrinsic to the validity of the will itself and of the same nature as those involved in determining the heirs of an intestate. If any distinction as to reviewability is to be drawn from the different language of the two sections, it should be made, not on the basis of the formal character of the proceedings in which the determination is made (whether involving a will or not), but on the basis of the nature of the issue determined, distinguishing between issues of a character common to testate or intestate estates (such as survivorship) and those involving the Secretary's exercise of the special powers given him by § 2 with respect to wills—namely, the power to prescribe regulations governing the making of wills and the power to approve or disapprove wills. Here, of course, as the court of appeals pointed out (Pet. 20–21), the issue does not in

any way involve matters of the latter character and is precisely the same as it would be if the father had died intestate. The sole issue was that of survivorship, and the fact that the son, if he survived, would take by devise rather than by intestate succession is essentially irrelevant and ought not affect the reviewability of the determination of that issue. In short, determinations of issues not going to the validity of a will should be equally "final and conclusive" whether made in intestate or will probate proceedings, and a distinction can meaningfully be drawn, if at all, only as to issues going to the validity of wills. And under that view of the statute, there is nothing inconsistent between the court of appeals' decision in *Homovich* v. *Chapman*, 191 F. 2d 761, reviewing the Secretary's determination of the validity of a will, and its refusal to review the Secretary's finding here on the question of survivorship.

2. Moreover, even if the "final and conclusive" standard of § 1 could not in terms be applied to determinations made in will probate proceedings, it would not follow that such determinations would be subject to the broad scope of review asserted by petitioner. Historically, Congress has entrusted the settlement of disputes as to Indian matters, as in other land matters, to the Department of the Interior and has never affirmatively provided for general review by the courts, by appeal or otherwise, of departmental decisions. *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Wilbur* v. *United States*, 281 U.S. 206. Hence, as those cases show, only the very limited review by mandamus, requiring a showing that the Secretary

has failed to follow the clear mandate of Congress, is available in this area. No broader review is required since, as this Court has often stated, *e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, the power of Congress in the administration of Indian affairs is "plenary."

Against that background, the significance of the omission from § 2 of the "final and conclusive" language of § 1 is much diminished. The effect of § 1 is to preclude even the limited mandamus review in heirship cases, and the silence of § 2 at most simply permits the mandamus standard of review to be applied. That was essentially the position taken by the court below in *Homovich, supra*, when, after holding that the Secretary's determination of the validity of a will was not "final and conclusive" and was subject to review, the court said nevertheless that—

> if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. * * * Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity. [191 F. 2d at 764.]

Here there is no contention that the Secretary was not acting within the scope of his authority, and hence the exercise of his judgment and discretion in resolving the question of survivorship, even if based on an erroneous view of Oregon law, is not subject to re-examination by the courts.

The Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) does not justify a greater scope

of review. By its own terms, that Act precludes judicial review where "agency action is by law committed to agency discretion" (§ 10). This case falls within that exception. Moreover, as the court below stated in *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 933, certiorari denied, 350 U.S. 884, the Administrative Procedure Act "does not render competent a court which lacks jurisdiction on any other ground." The Administrative Procedure Act "is merely declaratory of the existing law of judicial review and * * * it neither confers jurisdiction on this court above and beyond that which it already has," nor grants more rights than previously existed. *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225, 228 (D. Mass.); *Brisbois* v. *Hague*, 85 F. Supp. 13, 14 (D. Mass.); *Transamerica Corp.* v. *McCabe*, 80 F. Supp. 704, 707 (D. D.C.); *Atchison, Topeka and Santa Fe Ry. Co.*, v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo.), affirmed, 350 U.S. 892.

Conclusion

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

J. Lee Rankin,
Solicitor General.

Perry W. Morton,
Assistant Attorney General.

Roger P. Marquis,
Robert S. Griswold, Jr.,
Attorneys.

May 1960.

APPENDIX

U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C.

April 1, 1958.

Mr. RALPH CURRIN,
Attorney at Law,
P.O. Box 775,
Pendleton, Oregon.

DEAR MR. CURRIN: As one of the attorneys of record representing Joe Hayes in his appeal, decided by the Acting Solicitor on November 6, 1957 (IA–848), in the matter of the estates of John Thomas, deceased Cayuse allottee No. 223 (Probate No. 16056–52) and Joseph Thomas, deceased Umatilla allottee No. 877 (Probate No. 9599–56), you were advised by our letter, dated December 18, 1957, addressed to Koerner, Young, McColloch & Dezendorf, who appear as co-counsel with you in representing Joe Hayes, that time would be granted until January 10, 1958, to file with the superintendent a motion for reconsideration of the appeal. The superintendent was authorized and directed to withhold distribution pending further action.

The decision of the Solicitor is final under the regulations, but in view of the representations made concerning newly-discovered evidence, you were afforded the above time in which to perfect and file a motion for reconsideration. Specific instructions were given that such a motion should contain a detailed recitation and description of the newly-dis-

covered evidence, together with an explanation for the failure to procure the evidence for presentation at the hearings which have been held in these cases. You were further advised that if a timely motion were filed in conformity with the procedure stated, this office would then determine the matter on the basis of the showing made, and would either authorize further proceedings or direct the superintendent to distribute the estate in accordance with the Examiner's decision of June 20, 1956.

The motion was timely filed with the superintendent, which included the certification that copies thereof had been served on the adverse party and the Examiner of Inheritance. No response to the motion has been received from the adverse party, Mrs. Emma J. Luton who is not represented by an attorney.

It is contended that the alleged newly-discovered evidence is based upon further facts discovered upon an examination of the death records maintained by the Multnomah County Coroner, Portland, Multnomah County, Oregon. The examination revealed that an unidentified body was recovered from the river at Irving Dock on June 12, 1939, by the Harbor Patrol. The coroner's report, "Exhibit A" of the Motion, states that the body had probably been in the water one week to ten days. The report gives a description of the body recovered, the clothing worn and the property found on the body. The coroner's report indicates a similarity of description of the body recovered to that of Joseph Thomas, in complexion, age, height and weight. The similarity of clothing is limited to a black shirt with three glass buttons on the cuffs. The evidence adduced at the hearings by the testimony of Tony Benson, was that Joseph Thomas at the time of his disappearance was wearing his, Benson's black shirt. There is no evidence, however, that the black shirt worn by Joseph Thomas had three glass buttons

on the cuffs. Tony Benson also stated that Joseph Thomas was wearing, at the time of his disappearance, white corduroy trousers, whereas the coroner's report describes the trousers found on the recovered body as yellow or tan canvas.

The evidence adduced at the hearing by the testimony of Wade Minthorn, describes Joseph Thomas as having scars on various parts of his body, scalp, arms and hands, which resulted from fights in which he had been engaged. The coroner's report, on the other hand, states that no scars or marks were noted on the body recovered. It appears from the testimony of Joe Hayes, that he had viewed, at Portland, the remains of a body recovered from the river, which he failed to identify as being that of Joseph Thomas. He stated that he "couldn't tell who it was or whether it was an Indian or a white man." He further testified that Henry Galloway, the officer from the Agency, was with him at the time and he also had viewed the body. The notation on the coroner's report, Exhibit A, states that a key found on the body recovered was turned over to Mr. Galloway of the Umatilla Reservation. It appears that the body described in the coroner's report was the same as the one viewed by Joe Hayes and Mr. Galloway. Joe Hayes also testified that Joseph Thomas had been cut up at one time, while drunk and quarrelsome at Lapwai. Yet he did not testify as to witnessing any scars on the recovered body viewed by him. The Umatilla Indian Agency reported that it had no record of scars or marks on Joseph Thomas, but does record him as being 5 feet 8 inches tall and his weight about 170 pounds. The recovered body is shown on the coroner's report to have been 5 feet, 10 inches tall, and to have weighed 150 pounds.

It is quite evident that the evidence presented with the motion is not newly-discovered, but was available

at the time of the hearing and was partially covered at least by the testimony of the appellant, Joe Hayes. Moreover, the facts discovered upon the examination of the death records maintained by the coroner do not establish with any degree of certainty that the body recovered was that of Joseph Thomas, but on the contrary indicate that it was not.

Although we were not so advised by you or other attorneys of record for the appellant, Joe Hayes, we were advised by a hand-delivered letter, dated January 24, 1958, from attorney Leon Benezra of Washington, D.C., that he had been requested by you to enter his appearance in behalf of Joe Hayes, and enclosed a request for reconsideration on the grounds of gross error in law, together with his brief in support thereof. This latter request for reconsideration is not made in accordance with your request that we reconsider this case on the basis of newly-discovered evidence, and furthermore, that filing was not timely. Because of these factors, including the fact that the present matter was to be reexamined solely on the claim of newly-discovered evidence, which has not been established, the request for reconsideration is denied.

Nevertheless, without waiving the grounds for denial of the request for reconsideration, as stated above, the motion and brief on the points of law have been reviewed, even though briefs covering matters of law were heretofore presented both with the petition for rehearing and the appeal. The order of the Examiner of Inheritance and our opinion on the appeal both contain the finding that in order for the appellant, Joe Hayes, to inherit from John Thomas, the father of Joseph Thomas, Joe Hayes must show that Joseph Thomas died prior to September 22, 1940, the established date of the death of the father,

John Thomas. It is contended in the motion that the finding by the Examiner of Inheritance, presuming Joseph Thomas to be dead on August 3, 1946, likewise presumed the continuance of life of Joseph Thomas until August 3, 1946, and that there is accordingly, a fundamental error of law which has heretofore escaped the attention of persons interested in the adjudication of this matter.

Reference is made to our citation and the quotation from *Davie* v. *Briggs,* 97 U.S. 628 (1878), on page 3 of our decision, emphasizing that the presumption of the continuance of life, or the presumption of death, cannot be relied upon to establish a date of death of a person who had not been heard of for seven years. The court said in this case that " * * * if any one has to establish the precise period during those seven years at which some person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life." It is contended that the Examiner erroneously presumed the "continuance of life" of Joseph Thomas until August 3, 1946, at which point he was presumed to be dead, and therefore assumed that Joseph Thomas was in being at the time of the death of his father, John Thomas, on September 22, 1940.

It is further contended that the presumption that Joseph Thomas was in existence at the time of John Thomas' death is of importance in the adjudication of this matter because of the rule in the law of wills that "a devise or bequest to one who was not in being when the devise or bequest was to vest, was void and without legal effect." (Page on Wills, sec. 216, at p. 1957.) The question raised is whether Joseph Thomas was in existence at the time of the death of John Thomas on September 22, 1940, so as to take the de-

vise and inherit the estate willed to him. It is contended that if Joseph Thomas was not in being, the devise to him would not vest but as a consequence it would be void and the appellant, Joe Hayes, as the only heir of John Thomas, would inherit the latter's estate. It is further contended that a presumption that Joseph Thomas was in being at the time of John Thomas' death is erroneous and contrary to the law as found in *Davie* v. *Briggs, supra,* and that the burden is upon Emma Luten to introduce evidence to prove that Joseph Thomas, from whom her rights are derived, was in being on September 22, 1940, otherwise the devise to Joseph Thomas never vested, and was void.

The opinion of the court in *Davie* v. *Briggs, supra,* and a great many other cases, is to the effect that in an unexplained absence of a person for seven years the law raises no presumption as to the precise time of his death, the presumption being only that he is dead at the end of the seven years, but that such presumption does not extend to the death having occurred at the end of or at any particular time within that period but leaves it to be adjudged as a matter of fact that it was an earlier or a later date. However, in the absence of evidence to the contrary, or until a different presumption arises, the continuance of the life of a person to the common age of man will ordinarily be assumed.

An Oregon Statute, ORS 41.360(33), governs the presumption of continuance of life denied by the appellant in this case:

> A thing once proved to exist continues as long as is usual with things of that nature.

This Code provision was relied upon in a similar situation in *Fink* v. *Prudential Ins. Co. of America,* 162

Or. 57, 90 P. (2d) 762 (1939) at page 774, where the Court stated:

> We start our inquiry with the knowledge that Fink was living the day following his departure from Portland, and since the law authorizes a presumption that "a thing once proved to exist continues as long as is usual with things of that nature" (§ 9-807, subd. 33, Oregon Code, 1930), a conclusion is warranted that Fink, whose life expectancy was between twenty-eight and twenty-nine years at the time of his departure (Table of Mortality, 41 C.J., p. 216), was still alive when this action was begun, unless the record furnishes sufficient reason for believing the contrary. Therefore the burden of proof rests with the plaintiff to overcome the presumption of life and to furnish evidence from which death may be inferred.

In addition to the statutory presumption of continuance of life here available, a common law presumption can be inferred from the holding of the Supreme Court in *Fidelity Mutual Life Association* v. *Mettler,* 185 U.S. 308. The Supreme Court in this case found no objection to the instructions of the trial court to the jury:

> Absence alone cannot establish the death of Hunter, *for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live.* [Emphasis supplied.]

In *Occidental Life Insurance Co.* v. *Thomas,* 107 F. (2d) 876 (9th Cir., 1939), the Circuit Court of Appeals stated:

> * * * that a person who was alive when last seen is presumed to continue living until the contrary is shown;

See also *United States* v. *Wildcat;* 244 U.S. 111 (1917); *Quaker Realty Co.* v. *Starkey,* 136 La. 28, 66

So. 386 (1914); *Ferris* v. *American Ins. Union*, 245 Mich. 548, 222 N.W. 744 (1929); *Hoyt* v. *Newbold*, 45 N.J.L. 219 (1883); *English* v. *United States*, 25 F. (2d) 335 (D.C. Md 1928); *Brown* v. *New York Life Ins. Co.*, 57 F. (2d) 62 (8th Cir., 1932). This rule of law also is pointedly stated to be the existing law in 25 Corpus Juris Secundum (Death) section 5, as follows:

> One who is shown to be alive at a given time is presumed to remain alive until the contrary is shown by proof or, in the absence of proof, until a different presumption arises.

In the presumption of death arising from the absence of a person for seven years, such person cannot be presumed to have died before the expiration of that period, and in the absence of any evidence to the contrary, it will be presumed or inferred that he lived during the entire period. *Howard* v. *Equitable Life Assur. Soc.*, 197 Wash. 230, 85 P. (2d) 253 (1938); *Ferris* v. *American Ins. Union, supra.* At the end of seven years the legal presumption refers not only to the fact of death but also to the time of death, and in the absence of any fact except the absence of a person for seven years, without having been heard of, the presumption is that he died on the last day of the seven years. *Meyer* v. *Modreperla*, 68 N.J.L. 258, 53A. 477 (1902); *Fanning* v. *Equitable Life Assur. Soc.*, 264 Pa. 333, 107A. 715 (1919). On the issue as to whether Joseph Thomas survived his father, John Thomas, it is proper to assume, as the law does, that the life of Joseph Thomas, once shown to exist, is presumed to continue until death is presumed by reason of the unexplained seven-year absence, and that he survived one who died during the seven year period. *In re Buck's Estate*, 204 Mo. App. 1, 220 S.W. 716 (1920).

Knowing that Joseph Thomas was alive in 1939, it must be assumed that his life continued until his death was established by facts proving to the contrary, or until the presumption of his death was established by his unexplained disappearance and absence for a period of seven years. In the absence of proof of an earlier death, he must be assumed to have been living on September 22, 1940, and on each day during the seven years, and that after an absence of seven years he is presumed dead, but not before.

An Oregon case comparable to the case under consideration was decided in *Massachusetts Bonding & Ins. Co.* v. *Holman,* 62 F. (2d) 902 (9th Cir., 1933). In that case a testator, Phillip J. Worrell, bequeathed $5,000 to a son, William Worrell, who disappeared before the death of the testator. The presumption of death established seven years after William's disappearance, was six years after the death of the testator. It was contended that the legacy lapsed because William died before the execution of the will, and that he predeceased the testator. The court said:

> * * * William Worrell being alive, the presumption is that he continues to live until his death is established by satisfactory proof, or expiration of the period of limitation from absence, or being not heard from for more than seven years, and therefore dead by presumption of law. The presumption of life changed at the close of the last day of the seven year period, and the presumption at this time arises that he is dead, and obviously William Worrell was alive at the testator's death. * * *.

In the case of *In re Christin's Estate,* 188 Cal. App. 625, 17 P. (2d) 1068 (1933), the question was whether a father who had been missing for seven years had predeceased his child so as not to be entitled to inherit from the child. The court stated that:

> Although the general rule is that the presumption of life continues during the entire period of seven years following the disappearance of the person, such presumption may be overcome by evidence showing either that within such time the missing person was subject to some specific peril, or that other circumstances or conditions intervened sufficient to quicken the ordinary seven year period of time necessary to create the presumption of death.

In the light of the above circumstances, including the lack of convincing newly-discovered evidence, and upon full consideration of the legal question propounded which we do not regard as well founded, your request for a reconsideration of the decision on the appeal is denied. The superintendent of the Umatilla Agency is authorized, by virtue of this letter, a copy of which has been sent to him, to make distribution of the assets of this estate in accordance with the Examiner's decision of June 20, 1956.

Sincerely yours,

EDMUND T. FRITZ,
Deputy Solicitor.

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Supreme Court, U.S.
FILED
JUN 29 1960
JAMES R. BROWNING, Clerk

No. [redacted] -30

In The

Supreme Court of the United States

October Term, 1959

Jess Hayes,

Petitioner

v.

Fred A. Seaton, Secretary of the Interior,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 665

JOE HAYES,

Petitioner

v.

FRED A. SEATON, Secretary of the Interior,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

The petition for certiorari filed January 28, 1960, by the American Indian, Joe Hayes, respectfully directed this honorable Court's attention to the variance between the grounds asserted by the Secretary of the Interior as the basis for his determination in the District Court and those stated in the Court of Appeals.

The Government's brief in opposition to the petition for certiorari, filed May 31, 1960, acknowledges that the Government may have misstated to the Court of Appeals the substantive grounds for its determination of this case both as to the facts and the law.[1]

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[1] See footnote on page 6 of Respondent's brief in opposition.

BY MISSTATING THE SUBSTANTIVE GROUNDS FOR ITS DETERMINATION THE GOVERNMENT IMPEDED JUDICIAL REVIEW IN THE COURT BELOW, DENIED PETITIONER DUE PROCESS AND IRREPARABLY PREJUDICED PETITIONER'S CASE.

In order to clarify the record, petitioner respectfully presents below a detailed comparison of the conflicting grounds for the Secretary's determination stated by the Government, respectively, to the District Court and the Court of Appeals.

In the District Court, the Government stated the grounds for its determination as follows:

> "No evidence was presented on behalf of Emma J. Luton tending to show that Joseph Thomas survived his father. Therefore, the situation is that Joseph Thomas disappeared in 1939, that his father died September 22, 1940, *but that there is no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father.*"[1] (Emphasis supplied).
>
> "'If there is evidence of the facts, then no such presumption would be necessary . . . The Secretary of the Interior or his delegated representative, *found that there was no evidence sufficient to sustain a finding of fact as to the date of death of Joseph Thomas*, and, consequently made a presumption following the law of the State of Oregon.[2] (Emphasis supplied)

Thus we have a clear and unequivocal statement by the Government in the District Court that its determination in the case was grounded on a presumption under

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[1] The Government's "Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment" filed in the District Court on June 30, 1958, at page 11.

[2] The Government's "Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment" filed in the District Court on August 19, 1958, at page 8.

Oregon law and *that there was no finding of fact made by the Government* because there was "no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father".

Notwithstanding the above, the Government shifted its position 180 degrees and asserted diametrically opposed grounds in the Court of Appeals. Thus, in the Court of Appeals the Government stated the grounds for its determination as follows:

> "The determination which appellant seeks reviewed is one of fact." [1]
>
> "Thus, in this case we have a legitimate inference of fact adequately supported by the evidence . . . The inference of fact that the son's life continued at least until his father's death 13 months later is thereby firmly established beyond dispute at this time." [2]
>
> "Nowhere in that determination does the Examiner make use of the presumption of law to show the continuance of life of the son past the date of the father's death. On the contrary . . . the correctness of the Examiner's decision can be shown by sole reliance upon an inference of fact and without the presumption of law." [3]
>
> "The presumption was not essential to the ultimate determination." [4]

Thus, we have a categorical statement by the Government in the Court of Appeals that the presumption of law was unessential to its determination; that its determination was grounded on a finding of fact supported by the evidence; and that its determination could be supported solely on this finding of fact which was "firmly established beyond dispute at this time"

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[1] Respondent's brief in the Court of Appeals at page 7.

[2] Ibid. p. 13.

[3] Ibid. pp. 13, 14.

[4] Ibid. pp. 13, 14.